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In The

Supreme Court of the United States

October Term, 1968

No. 1064

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLANT

Joined in and Adopted by the States of Arkansas, Delaware, Illinois, Kentucky, Mississippi, and Montana, The Virgin Islands, and The National District Attorneys Association, Appearing as Amici Curiae.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (A. pp. 27-46) is reported as HENRY C. ALFORD v. STATE OF NORTH CAROLINA, 405 F. 2d 340 (4th Cir. 1968).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (2). Probable jurisdiction was noted on April 7, 1969.

QUESTIONS PRESENTED

I. IS THE NORTH CAROLINA STATUTORY SCHEME

FOR THE IMPOSITION OF A DEATH PENALTY UNCONSTITUTIONAL BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968)?

II. ARE GUILTY PLEAS INVALID BY FORCE OF UNITED STATES v. JACKSON, *SUPRA*, WHEN THE DEFENDANT WAS INDICTED FOR A CAPITAL OFFENSE AND WAS SENTENCED TO LIFE IMPRISONMENT UPON HIS ENTRY OF A PLEA OF GUILTY TO THAT CAPITAL OFFENSE?

III. ARE GUILTY PLEAS INVALID BY FORCE OF UNITED STATES v. JACKSON, *SUPRA*, WHEN THE DEFENDANT WAS INDICTED FOR A CAPITAL OFFENSE AND ENTERED A PLEA OF GUILTY TO A LESSER INCLUDED OFFENSE PUNISHABLE NOT BY DEATH BUT BY A TERM OF YEARS?

IV. IS THE HOLDING IN UNITED STATES v. JACKSON, *SUPRA*, TO BE RETROACTIVELY APPLIED?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Sixth Amendment to the Constitution provides as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

At the December 2, 1963 Term of the Superior Court of Forsyth County, North Carolina, Henry C. Alford was indicted for the Murder in the First Degree of Nathaniel Young, and Fred G. Crumpler, Esq., of the Winston-Salem, North Carolina, Bar was appointed as his counsel.

Counsel thoroughly investigated the case, including the questioning of the investigating officers and all witnesses for the State. Counsel also contacted all witnesses named to him by Alford, except for a person named "Jap" who could not be located. Counsel found that none of the witnesses would be helpful to Alford, but that all of their testimony was detrimental and concluded that the State's case against Alford was overwhelming.

Counsel discussed this matter with Alford on several occasions, advised him of the testimony of the witnesses against him, and also advised him of the possible jury verdicts. Alford, after discussing the situation with counsel and his sister, who had been contacted by counsel, decided to enter a plea of guilty to second degree murder and signed a statement, read to him by Mr. R. B. Haskins, a Deputy Clerk of the Superior Court of Forsyth County, authorizing the entry of the plea of guilty to second degree murder.

On December 10, 1963, Alford, through counsel, entered a plea of guilty to second degree murder. Subsequent to the presentation of witnesses, Alford took the stand. Alford admitted that he had been advised of his rights and he had authorized the entry of the guilty plea. He repeatedly admitted the entry of the plea, the weight of the evidence against him,

and his continuing desire to enter the plea of guilty to second degree murder, although he did qualify his statement with a continuing denial of guilt. Alford also admitted to a homicide conviction in Virginia, nine convictions of armed robbery and a lengthy list of other convictions. Before the guilty plea was accepted, there was a statement of the State's evidence, including declarations by Alford a few moments before the homicide of his purpose to kill the victim and admissions, shortly thereafter, that he had done it. The plea of guilty to second degree murder was accepted and Alford was sentenced to a term of thirty (30) years. He did not appeal.

Subsequently, Alford applied for a Writ of Certiorari to the Supreme Court of North Carolina, but the Writ was denied on March 24, 1964, and the case remanded for a post-conviction hearing in the Superior Court of Forsyth County. At the December 7, 1964 Term of the Superior Court of Forsyth County, Alford was given a plenary hearing before Judge Frank M. Armstrong. On March 19, 1965, Judge Armstrong entered an Order containing findings of fact and conclusions of law denying the relief sought by Alford. Alford then requested a Writ of Mandamus from the Superior Court of Forsyth County which was denied on April 14, 1965. He then applied for another post-conviction hearing which was denied on May 3, 1965. Alford did not apply for a Writ of Certiorari to the Supreme Court of North Carolina to review the Order of Judge Frank M. Armstrong.

Alford filed his first application for a Writ of Habeas Corpus with the United States District Court for the Middle District of North Carolina on June 16, 1965. On June 18, 1965, the Court entered an Order dismissing the application since Alford was not within the jurisdiction of the Middle District Court. Alford was subsequently transferred within the jurisdiction of the Middle District Court of North Carolina and the Court was so advised. The Court thereupon entered an Order considering the paper-writing as a motion to reconsider the petition which the Court granted. The Court had the benefit of

the transcript of the State post-conviction hearing and adopted the findings of fact of the State Court. In a lengthy opinion, District Judge Eugene A. Gordon found Alford's plea to be voluntary and denied the relief sought. (Memorandum and Order, Case No. C-112-G-65, A. pp. 12-18).

Forty-eight days after the District Court's Order denying the Writ, Alford filed a Notice of Appeal. The District Court considered the Notice as a "Motion in the Cause to Allow an Appeal and a Motion for a New Hearing." Both were denied and from that denial Alford appealed. The Court of Appeals for the Fourth Circuit in Memorandum Decision No. 10,391 affirmed the denial. (A. pp. 21-22).

On December 8, 1965, a petition for a Writ of Habeas Corpus was filed directly in the United States Court of Appeals for the Fourth Circuit. In a Memorandum Opinion dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. (Memorandum Decision No. 220, A. pp. 19-20).

Alford filed still another petition for a Writ of Habeas Corpus in the United States District Court for the Middle District of North Carolina. The Honorable Eugene A. Gordon again considered Alford's various contentions and once more concluded that none of his constitutional rights had been violated and denied the petition. (Memorandum Opinion and Order, Case No. C-98-G-67, A. pp. 23-26).

Alford then appealed to the United States Court of Appeals for the Fourth Circuit to review the summary denial by Judge Gordon in Memorandum Opinion and Order No. C-98-G-67, filed June 5, 1967, and the Fourth Circuit Court of Appeals concluded that, under the guiding principles of UNITED STATES v. JACKSON, 390 U. S. 570 (1968), enunciated subsequent to the judgment of the District Court, that the judgment appealed from should be reversed and in so doing held not only "that in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional," and hence capital punish-

ment may not, under JACKSON, be imposed under any circumstances," but went beyond the holding in UNITED STATES v. JACKSON, *supra*, in holding that JACKSON is applicable when the defendant pleads guilty to a lesser included offense punishable only by a term of years and not by death. (A. p. 34).

The State of North Carolina appealed the opinion of the Fourth Circuit to this Court and on April 7, 1969, probable jurisdiction was noted.

ARGUMENT

I.

THE NORTH CAROLINA STATUTORY SCHEME FOR THE IMPOSITION OF A DEATH PENALTY IS NOT UNCONSTITUTIONAL BY FORCE OF UNITED STATES v. JACKSON, 390 U. S. 570 (1968).

The Federal Kidnaping Act, 18 U.S.C. Section 1201(a) provides:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

This statute created an offense punishable by death "if the verdict of the jury shall so recommend."

This Court in UNITED STATES v. JACKSON, 390 U. S. 570 (1968), described the question presented as follows:

> "Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious enough to seek a jury acquittal stands

forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. *Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury.* The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." (Emphasis added.)

In UNITED STATES v. JACKSON, *supra*, this Court held the selective death penalty provision of the Federal Kidnaping Act imposes an "impermissible burden upon the assertion of a Constitutional right". We submit the decision in JACKSON is limited to the statutory scheme established by the Federal Kidnaping Act, does not have wider applicability, and is not applicable to this situation where Alford pled guilty to a lesser offense, punishable only by a term of years, and not by death.

The Federal Rules of Criminal Procedure permit a defendant to plead guilty, or plead not guilty and be tried by a jury, or plead not guilty and waive a jury trial. (See Rule 23(a) of the Federal Rules of Criminal Procedure.) Thus the defendant charged with kidnaping who asserts his right to a jury trial, faces "the risk of death" as the price of his "free exercise" of that Constitutional right. UNITED STATES v. JACKSON, *supra*.

A Federal jury trying a defendant pursuant to the provisions of the Kidnaping Act, until the JACKSON case, acted in a dual capacity. The jury was the trier of the facts, determining either guilt or innocence. If the jury found the defendant guilty, it then possessed the authority to designate the death penalty, thereby increasing the punishment imposed upon the defendant beyond the authority granted to the court in sentencing the convicted defendant.

The North Carolina Constitution, Article 1, Section 13, prohibits a trial upon a plea of not guilty "but by the unani-

mous verdict of a jury of good and lawful persons in open court . . . ." This right cannot be waived. The defendant cannot plead not guilty and waive a jury trial. The determinative facts must be found by a jury. STATE v. MUSE, 219 N. C. 226, 13 S. E. 2d 229 (1941); STATE v. HILL, 209 N. C. 53, 182 S. E. 716 (1935).

A defendant charged with a capital crime (first degree murder, first degree burglary, arson and rape) may plead not guilty and be tried by a jury, or he may plead guilty, and if the court accepts the plea, the defendant must be sentenced to life imprisonment.[1] (See A. p. 47). If the defendant pleads not guilty and if the jury finds him guilty, the penalty is death unless the jury recommends mercy. (A. pp. 47-48).

The death sentence is imposed by statute upon the jury's finding the defendant guilty of a capital crime. The jury is not, as in the JACKSON case, usurping the province of the judge in sentencing the defendant, but serving as the trier of the facts. However, the jury is given the discretion in each of the capital crimes to recommend life imprisonment. This procedure parallels 18 U.S.C.A., Section 1111, wherein the penalty for murder in the first degree within Federal Jurisdiction is death, unless the jury qualifies its verdict with the words "without capital punishment," in which event the penalty is life imprisonment. The North Carolina jury in a capital case, as a Federal jury in a first degree murder case, is given the power to eliminate the automatic imposition of the death penalty upon a conviction of a capital crime.

The ability of the jury to mitigate the statutory punishment is contra to the unconstitutional burden imposed upon the defendant in the Federal Kidnaping Act. The North Carolina capital jury is given the ability to recommend mercy upon a capital conviction. The Federal jury, and only the jury, upon a conviction for kidnaping had the ability to impose the death

1. N.C.G.S. 15-162.1 (plea of guilty of first degree murder, first degree burglary, arson or rape) was repealed by the 1969 Session of the North Carolina General Assembly on March 25, 1969. (Session Laws 1969, Ch. 117)

penalty, rather than permit the court to impose a sentence for any term of years or for life.

In reviewing the differences between the Federal Kidnaping Act and the North Carolina Statutes, the Supreme Court of North Carolina in STATE OF NORTH CAROLINA v. OTIS EUGENE PEELE, 274 N. C. 106, 111, 161 S. E. 2d 568, 572 (1968) stated:

> "We think there are certain material differences in the Federal Kidnaping Act and in North Carolina Statutes 14-21 and 15-162.1, and that JACKSON is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnaping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G.S. 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty, which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute. Except as provided in G.S. 15-162.1, the North Carolina practice will not permit a defendant to plead guilty to a capital felony. G.S. 15-187 provides the death sentence shall be executed '. . . against any person in the State of North Carolina *convicted* of a crime punishable by death . . . .' (Emphasis added.)
>
> "G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under

> rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the JACKSON case, there are 'defendants who would greatly prefer not to contest their guilt.' Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty. The possibility of a death penalty, however, has deterring effect—how much, no one knows. . . ."

Additionally, an examination of the legislative history of the Federal Kidnaping Act and of the various North Carolina Statutes declared unconstitutional by the Fourth Circuit further reveals the inapplicability of JACKSON. The Federal Kidnaping Act, as originally enacted in 1932, contained no provision for capital punishment. The 1934 amendment inserted the provision authorizing the death penalty "if the verdict of the jury shall so recommend." The decision in JACKSON held this amendment unconstitutional. Prior to 1934 a defendant could contest his guilt without risk of death. Under the 1934 amendment he could not.

Until 1949, the death penalty was automatically imposed in North Carolina upon a defendant convicted of a capital offense. The defendant, if convicted of a capital offense, received the only sentence permitted by law, death. However, in 1949, the proviso was added by amendment to each capital offense permitting the jury to recommend life imprisonment.

N.C.G.S. 15-162.1 was not enacted until 1953. Prior to 1953, a capital defendant could not plead guilty to the capital charge. It is evident that N.C.G.S. 15-162.1 and the provisos added in 1949 to the various capital crimes permitting the jury to recommend life imprisonment are separate and distinct legislative provisions.

The legislative history of the Federal Kidnaping Act and the various North Carolina statutory provisions declared uncon-

stitutional by the Fourth Circuit are so dissimilar that JACKSON cannot be held to be a basis for declaring invalid the North Carolina statutory scheme.

The North Carolina statutory scheme consisted of separate, distinct statutes, passed at separate times and each capable of standing alone, unlike the unitary scheme presented in the Kidnaping Act.

II.

THE JACKSON DECISION DOES NOT INVALIDATE GUILTY PLEAS ENTERED TO CAPITAL INDICTMENTS.

In JACKSON, *supra*, this Court held the infirmity of the death penalty provision of the Federal Kidnaping Act severable from the remainder of the Act, leaving the remainder in full force, and remanded for the entry of a plea free from the burden of the death penalty. In POPE v. UNITED STATES, 392 U. S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145, based upon JACKSON, this Court held the death penalty provisions of the Federal Bank Robbery Act (18 U.S.C. Sec. 2113(e)) was invalid but the remainder of the Statute, the death penalty provision being separable, was valid. In JACKSON the defendant was yet to enter a plea to the indictment and in POPE the defendant was convicted by a jury and sentenced to death. Neither case is authority for the issue here presented. "Are all pleas of guilty in a statute containing a JACKSON type defect invalid?" We submit not. JACKSON is not authority for a conclusion of such broad constitutional impact and should not be applied to void every conviction where a defendant has entered a guilty plea. This Court stated in JACKSON that the Kidnaping Act "needlessly" penalized a defendant who stood on his right to plead not guilty before a jury—and Mr. Justice Stewart stated that defendants who acknowledged their guilt and wish to avoid the ignominy of public trial have traditionally been allowed to plead guilty, and, in addition, that a

flexible and efficient judicial system requires the use of guilty pleas.

N.C.G.S. 15-4.1 provides, *inter alia*:

> ". . . , but a defendant without counsel cannot plead guilty to an indictment charging a capital felony. . . ."

The right to counsel in capital felonies has been recognized in North Carolina since the very establishment of this State. In STATE v. HEDGEBETH, 228 N. C. 259, 45 S.E. 2d 563 (1947), the North Carolina Supreme Court said:

> "The Constitution of North Carolina, Art. I, sec. 11, contains this provision: 'In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees or necessary witness fees of the defense, unless found guilty.' And this constitutional provision is further implemented by statute (G.S., 15-4) in these words: 'Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense.' (Session Laws 1777, C. 115).
>
> "*In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G.S. 15-5, and by numerous decisions of this Court. . . .*" (Emphasis added.)

It is evident in this case Alford's court-appointed counsel was extremely diligent in his behalf in securing the entry of a plea to second degree murder. Yet, in a larger sense, the North Carolina Constitution and applicable statutes clearly reveal that guilty pleas to capital offense are serious matters which must satisfy many constitutional, statutory and procedural requirements before they are accepted.

Furthermore, N.C.G.S. 15-162.1 (plea of guilty of first de-

gree murder, first degree burglary, arson or rape) provided for punishment by life imprisonment when a plea of guilty was entered to the capital crime. A state legislature can provide for the tender of a plea, and for the punishment by life imprisonment upon acceptance of the plea.

In JACKSON, the issue arose in the context of a burden being placed upon a plea of not guilty where only a jury trial upon that plea, but not a bench trial, could result in the death penalty. JACKSON is authority to void a scheme such as that presented in the Kidnaping Act, which burdened a defendant's right to a jury trial upon a plea of not guilty. It is not authority to hold invalid guilty pleas.

Not having previously spoken directly on the issue of defendants who plead guilty to capital offenses, and in light of the various safeguards imposed prior to the acceptance of such pleas, this Court should not hold void all pleas entered in a procedure so firmly entrenched in the history of the judicial system.

III

THE JACKSON DECISION IS NOT APPLICABLE TO PLEAS TO LESSER INCLUDED OFFENSES WHEN THE DEFENDANT WAS ORIGINALLY INDICTED FOR A CAPITAL FELONY.

Although the State of North Carolina is appealing from the holding of the Fourth Circuit in its application of JACKSON, we emphasize yet another defect in ALFORD arising from the factual basis of this case, by quoting at length from Chief Judge Haynsworth of the Fourth Circuit in his dissent as he aptly describes the non-applicability of JACKSON to lesser plea situations, and Alford s plea in particular:

> "I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum

statutory punishment for which is imprisonment for not more than thirty years . . . .

* * *

"The plea of guilty to murder in the second degree, however, was not the product of the constitutional infirmity in the statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sentence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degre would not have differed in the slightest from the pressure he actually experienced.

". . . If he is well advised, he will again tender a plea of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute which bears no causal relationship to the entry of the plea which the majority strikes.

"Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The

death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of a more likely sentence of life imprisonment than of the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

"Such plea bargaining, when the defendant is properly represented, is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

"There is nothing in JACKSON which intimates disapproval of that kind of plea bargaining. Its absence, or the absence of agreement, is the thing that produced the JACKSON dilemma. Yet, that is all that happened here. Alford successfully bargained for a plea to a lesser included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the statute not been constitutionally defective. He may be expected to do the same thing again at his retrial. In JACKSON the statutory defect created the issue, here it has no causal connection with it." 405 F. 2d at 349-351. (A. pp. 41-44).

We submit that a defendant, charged with a capital felony, who is represented by counsel, does not act under coercion when, on the strength or weight of the evidence establishing his guilt, he pleads guilty to murder in the second degree or manslaughter, voluntary or involuntary. Neither, does a defendant charged with rape act under coercion, when he pleads guilty to an assault with intent to commit rape or an assault

on a female by a male person over the age of eighteen (18) years. Nor under like circumstances, does a defendant charged with burglary in the first degree, arson, or any other felony, act under coercion when he pleads guilty to a lesser degree of the same crime, or an attempt to commit the crime so charged, or an attempt to commit a lesser degree of the crime so charged. Similarly, we submit that a defendant charged with a felony is not acting under coercion when he pleads guilty to an included misdemeanor.

There can be no doubt that when a defendant pleads guilty to an included crime of a lesser degree, both he and his counsel take into consideration the evidence of the State, the evidence available to the defendant, and all other factors pertinent to the advisability of tendering such plea, including the possibility of conviction by the jury of the crime as charged, or of a more serious lesser degree of the crime as charged, and the possibility of greater punishment as a result of the conviction of the original charge or a higher included degree of a lesser charge.

The *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty* (Tent. Draft 1967) states:

> "The plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea will make it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.
>
> ". . . Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for

> funds and personnel. . . . Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.
>
> "It may thus be concluded that the frequency of conviction without trial not only permits the achievement of legitimate objectives . . . but also enhances the quality of justice in other cases as well."

We submit in JACKSON this Court recognized the utility of the guilty plea and it would be tragic indeed if JACKSON denies this time honored method of determining guilt without trial, with the attendant burden that will be placed on all courts.

The Fourth Circuit, in striking down the obvious plea bargaining situation in ALFORD, expressly sanctioned plea bargaining in a later yet unpublished decision, UNITED STATES OF AMERICA v. WILLIAM DOVE WILLIAMS, ... F.2d ..... (4th Cir., March 5, 1969) with these words:

> *"We think that plea bargaining serves a useful purpose both for society and the prisoner and is a permanent part of the criminal courtroom scene,* . . . Here it seems rather obvious that in return for guilty to one count permitting the court ample latitude for adequate punishment (ten years) the prosecutor agreed, *quite properly we think,* to dismiss the other counts. Why not say so?" (Empasis added.)

IV.

THE JACKSON DECISION SHOULD NOT BE RETROACTIVELY APPLIED.

The rule relating to retroactivity was stated by this Court in STOVALL v. DENNO, 388 U. S. 293, 18 L. Ed. 2d 1999, 87 S. Ct. 1967 (1967) as follows:

"Our recent discussions of the retroactivity of other con-

stitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. LINKLETTER v. WALKER, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601, *supra;* TEHAN v. UNITED STATES ex rel SHOTT, (382 U. S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453,) *supra;* JOHNSON v. STATE OF NEW JERSEY, (384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882,) *supra.* 'These cases established the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" * * *' JOHNSON, *supra* 384 U. S., at pp. 726, 727, 86 S. Ct. at 1777. *The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.*" (Emphasis added).

In UNITED STATES OF AMERICA ex rel BUTTCHER v. YEAGER, 288 F. Supp. 906, 909, District Judge Coolahan, in discussing the possible retroactive impact of JACKSON on the State of New Jersey, said:

"In addition, the countervailing factors mentioned in the STOVALL decision are most strong in the circumstances of the present case. There can be no doubt that the New Jersey courts and law enforcement authorities have, since 1893, relied on the present system by which defendants pleading non vult to a murder indictment cannot be sentenced to more than life imprisonment. See STATE v. SULLIVAN, 43 N. J. 209, 243, 203 A. 2d 177 (1964). Furthermore, the effect on the administration of justice, should it be determined that the JACKSON decision is both retroactive and applicable to the New Jersey murder statute, would be disastrous, as every convicted murderer in New Jersey who, at the scheduled time for

his trial, pleaded non vult to the indictment against him would be forthwith released from incarceration. This Court cannot conclude that the JACKSON decision is retroactive."

In KINCAID WILSON v. STATE OF NORTH CARO,-LINA, No. 2216, (E.D.N.C., February 27, 1969), District Judge Larkins in commenting upon the possible retroactivity of the ALFORD decision, stated:

"Another factor in the determination of the retroactive operation of a decision is the 'effect on the administration of justice.' TEHAN v. SHOTT, 382 U. S. 406, 418, 15 L. Ed. 2d 453, 461, 86 S. Ct. 459 (1966). In the TEHAN case, GRIFFIN v. CALIFORNIA, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965), was not given retroactive operation because to 'require all those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.' TEHAN v. SHOTT, *supra*, 382 U. S. 406, 419. Since far more persons plead guilty than go to trial, the retroactive operation of ALFORD would be even more devastating.

"After full consideration of all the factors, this Court is not able to say that the rule in ALFORD v. STATE OF NORTH CAROLINA, *supra*, requires retroactive operation. This Court rejects the idea that if a statute was in force in 1963, and in 1968 its construction is changed so that it is no longer in force, it should be concluded that it was never in force. Quoting Justice Vinson in WARRING v. COLPOYS, 122 F. 2d 642, 647, certiorari denied 314 U. S. 678, 86 L. Ed. 543, 62 S. Ct. 184, 'It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity,

> for that, in turn, would be down right chaotic.' Accordingly, the ALFORD rule shall only be applicable to those criminal actions commencing after November 26, 1968."

Commenting further upon ALFORD, District Judge Larkins, in CARMICHAEL v. STATE OF NORTH CAROLINA, No. 2102 (E.D.N.C., April 15, 1969) said:

> ". . . the retroactive application of ALFORD would seriously disrupt the administration of the criminal laws within the State of North Carolina. If ALFORD were to be retroactively applied it could arguably necessitate the retrial of all defendants who have heretofore been convicted upon their pleas of guilty to indictments charging one of the capital crimes, or who, having been indicted for a capital offense, plead guilty to lesser included offenses. The Constitution does not require such a result. LINKLETTER v. WALKER, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965)."

The ruling in JACKSON as extended by ALFORD, was not foreshadowed in any case. No court announced such a requirement until the Fourth Circuit extended the holding in ALFORD. The law enforcement authorities of the Federal Government and of all the states and territories have heretofore proceeded on the premise that such procedures, as now condemned, were constitutional. The various statutory schemes condemned in JACKSON and ALFORD were assumed to be constitutional by the Federal Government, and the governments of the various states and territories. The impact of no other decision of this Court, except for GIDEON v. WAINWRIGHT, 372 U. S. 335 (1966), can have such an impact upon the administration of justice. Court calendars will be disrupted nationally, and post-conviction proceedings overwhelmed, if JACKSON and ALFORD are retroactively applied. Delay is well known as the best friend of defense counsel, and if retrials are now required, now that memories have faded and witnesses and evidence are no longer available, we could expect that

prison gates would be opening wide to all capital felons convicted upon their pleas of guilty due to the weight of evidence of their guilt amassed years previously at their trials, but now, most probably, no longer available. The results are so frightful and devastating that further comment should not be required.

North Carolina cannot present empirical statistics of the number of convictions obtained upon pleas of guilty to lesser included offenses when the defendant was indicted for a capital felony. This would involve a case by case review of every conviction inasmuch as there is no way of telling for which particular crime an inmate may originally have been indicted. However, our studies have shown that as of February 1, 1969, there were 448 inmates serving life sentences and a review of twenty percent (20%) of all files of these inmates produce the finding that 68.8% of all inmates serving life sentences were convicted upon pleas of guilty to capital charges and received the mandatory life sentence. We have not produced any statistics relating to pleas to lesser included offenses, but we submit that the number, unquestionably, would be substantial and vastly in excess of the number who entered pleas to capital offenses. It has been estimated that ninety percent (90%) of all criminal convictions are by pleas of guilty. D. Newman, The Determination of Guilt or Innocence Without Trial 4 (1966).

North Carolina does not stand alone among the states upon which the devastating impact of retroactivity would fall. In ALFORD the Fourth Circuit also concluded that the State of New Jersey's non-vult procedure was also unconstitutional. (N.J.S.A. 2A:113-3, 4) and New Jersey would be faced with retrying all murder convictions upon non-vult pleas setting aside all capital convictions and all convictions upon lesser pleas when the accused was indicted for murder.

Although the State of New York has abolished the death penalty, New York will face a similar dilemma, since, upon a guilty plea, life imprisonment was imposed for murder under

former procedures. (N.Y. Code of Cr. Proc. Sec. 332.1). South Carolina now submits the question of punishment to a jury in every capital case, but retroactivity will also affect their former procedure. (S.C. Code Sec. 17-553.4).

We can also illustrate that the JACKSON-ALFORD defect exists in Louisiana (La. Code of Crim. Procedures, Art. 557), New Hampshire (N.H. Rev. Stat. Ann. 585:4, 5), Wyoming (Wyo. Stat. Ann. Sec. 6-59), and Texas (Vernon's Ann. Code Crim. Proc. of Texas, Art. 1.14). And, if these states assumed their various statutes were constitutional, what then can be said for the Federal Government which established a lengthy list of criminal statutes with JACKSON defects. The Federal statutes, containing JACKSON defects, commencing with the Federal Kidnaping Act (18 U.S.C. 1201(a)), includes 18 U.S.C. 1111 (murder), 21 U.S.C. 176b (sale of narcotics to minors), 42 U.S.C. 2274-76 (atomic secrets) and 18 U.S.C. 2113(e) (bank robbery). In addition, retroactivity will affect convictions under D. C. Code Ann. Sec. 22-2801 (rape). The impact upon these eight (8) states, North Carolina, New Jersey, New York, South Carolina, Louisiana, New Hampshire, Wyoming and Texas, and perhaps others which our research failed to discover—will be devastating indeed—as will be the impact upon the federal government in all cases of prosecution under the tainted statutes.

There is at present a heavy burden upon the administration of justice, in all courts across this land—and this state, and our sister states, cannot stand the devastating impact if retroactivity of these doctrines is to stand. Our courts are overcrowded. Our citizens are subjected to ever increasing violence. No court system can absorb the thousands of cases that affirmance of the ALFORD doctrine would create. Delays would increase, justice will creep, and respect for judicial procedures will be a mockery if, now, at retrials the various states will be forced to free infamous felons because the defense lawyer's best friend—delay—will have made evidence and wit-

nesses unavailable, and if available, witnesses will now have memories dimmed by the passage of time.

The evidence and witnesses were available for the original trials, often many years ago, and, because of the weight of the evidence available, the defendants pled guilty to the charges or lesser included offenses. We submit that the proper administration of justice compels a denial of retroactivity.

CONCLUSION

For the foregoing reasons we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

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CERTIFICATE

I, JACOB L. SAFRON, one of the Attorneys for the Appellant, hereby certify that on May 22, 1969, I served a typewritten final copy of the foregoing Brief on the Attorney of Record for the Appellee, Doris R. Bray, Esquiress, by handing and leaving with her personally, at Greensboro, North Carolina, a full typewritten copy of the foregoing Brief.

JACOB L. SAFRON
Staff Attorney

Sworn to and subscribed before me on
this the 26th day of May, 1969.

S/Alice C. Gorham
NOTARY PUBLIC

My Commission Expires May 20, 1970